IN THE

SUPREME COURT

OF THE

UNITED STATES

WEST COAST HOTEL COMPANY, a Corporation, *Appellant,* vs. ERNEST PARRISH and ELSIE PARRISH, his wife, *Appellees.*	No. 293.

BRIEF OF AMICI CURIAE

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STATEMENT

HISTORICAL

The minimum wage law of the State of Washington, the constitutionality of which has been questioned by the appellant in this case, was passed by the State of Washington in the year 1913, Laws of Washington, 1913, chapter 174, and has been the law of Washington for twenty-three years. It had been twice sustained as valid by the supreme court of Washington prior to the decision in the instant case. *Larsen v. Rice*, 100 Wash. 642, and *Spokane Hotel Co. v. Younger*, 113 Wash. 359.

The law itself is identical with the law of the State of Oregon which was before this court in the case of *Stettler v. O'Hara*, 243 U. S. 629, 37 Sup. Ct. 475, and was affirmed without an opinion by an equally divided court.

STATEMENT OF THE ISSUES

We take the position that the law applicable to this case has not been passed upon by this court. The present action is an action in contract between a chambermaid, as plaintiff, and an inn keeper, as defendant. The amount in controversy is $216.19. The state statute is involved only incidentally. The order complained of is an order made by the welfare committee of the state and affects the public housekeeping industry, that is, hotels.

As we view the matter, the law is to be tested upon the issue brought out in the evidence. It is wholly immaterial whether or not Washington's minimum wage law is valid or void so far as every other industry in the state may be concerned. If it is a valid exercise of the police power of the state when applied to the public housekeeping industry, that is, to the wages of a housekeeper in a hotel, then the decision of the supreme court of Washington should be affirmed.

We desire to call attention in the first place to the fact that the occupation of chambermaid in a hotel is one ordinarily not performed by men. That if a man should engage in the occupation in question, it is fairly to be assumed that he would receive a larger wage than would a woman when doing similar work.

In the second place, there is no evidence in this case as to what was the reasonable value of the work and labor performed by the appellee for the appellant. The record is short, and contains no evidence from which the court can determine whether or not the wages fixed by the welfare committee are more or less than a reasonable wage under the conditions of the employment. The

appellant made no proof, nor offer of proof, to the effect that the wage was unreasonable.

The appellant frames its brief upon the theory that the statute fixes the wages of women and children in industry. We submit that the statute of Washington does no such thing. It declares the public policy and authorizes the welfare committee after a hearing to establish a minimum wage for women in the occupation affected, and for which the hearing was called, and the standard conditions of labor for said women.

The appellant scarcely mentions the order of the welfare commission applying to the public housekeeping industry, a copy of which is incorporated in the plaintiff's complaint in the superior court, shown in the transcript. (No copy of the transcript is available to us, and we are unable to cite the page thereof.)

It does not appear from the evidence or from any of the exhibits upon what facts the welfare commission based its recommendation for the industry in question. A review of this action of the commission on questions of law is provided for in section 19 of the act under consideration, while questions of fact arising under the act are to be determined by the committee, and no appeal lies from its decision upon a question of fact.

It is true that the welfare committee is directed by the law under certain conditions to fix the wages of women employed in an industry within the state of Washington. This board takes testimony and makes its orders upon the recommendation of a conference. It then issues an obligatory order specifying the minimum wage for women in the occupation affected. (Sections

10 and 11.) The statute, section 3, provides that the industrial welfare commission is empowered to establish such standards of wages and conditions of labor for women and minors as shall be held hereunder to be reasonable, not detrimental to health and morals and sufficient for the decent maintenance of women. Whether the wage in question was fixed for the hotel industry on the basis of its being "reasonable," or whether it was a minimum only sufficient for the "decent maintenance" of women, does not appear.

A copy of the order for the public housekeeping industry is incorporated in the complaint. Whether it is more or less than reasonable compensation under all the circumstances does not appear. No effort was made to show that a reasonable and fair rate was either more or less than the rate established by the welfare committee. The appellant below testified that at the time in question he actually was paying a lower rate, but did not say that such lower rate was fair either to the hotel or to the employee.

The supreme court of Washington, it is true, upheld the law in all its particulars, but the law in all of its particulars is not in issue in a private controversy between a hotel and its employee in a suit brought by the employee upon an implied contract for the difference between the minimum wages established by the welfare commission and the wages actually paid to the worker.

It is the appellee's contention here that the record is devoid of relevant facts necessary for a full consideration of the question of the validity of the Washington minimum wage statute which the appellant so vigorously assails.

THE ISSUES AND PROCEEDINGS BEFORE THE TRIAL COURT

It may very well be invalid under conditions which might be brought before the court, but the only conditions that are before this court are first, an order of the welfare commission establishing a minimum wage in the hotel industry, an action wherein it is alleged that the plaintiff worked for the hotel as a chambermaid under such conditions that an implied agreement arose on the part of the hotel company to pay her the minimum wage. The answer alleged the invalidity of the wage law, and set up a contract as controlling the matter upon a wage other and different than that prescribed by the committee.

There are no findings of fact. The trial court launched off into a discussion of the *Adkins* case (261 U. S. 525), announced that the minimum wage law of Washington was invalid under the principles of the *Adkins* case, and rendered a judgment for the employer. The supreme court might very properly have reversed the cause because the court below made no findings of fact or conclusions of law in support of his judgment, and the fact that the court discussed the constitutionality of the law in its opinion is of no controlling force. The judgment of the trial court was erroneous in any event.

The real issues in this case bring it more nearly within the rule of the case of *Levy Leasing Co. v. Siegel*, 258 U. S. 242, rather than within the rule of *Adkins* case (261 U. S. 525). The rule in the *Levy Leasing Co.* case, as abbreviated in the syllabus, holds that the obligation to pay a specified rent can not be said to be impaired by a limitation on the recovery to what is fair and reason-

able made by an act existing when the lease was made and carried into a subsequent statute. (258 U. S. 242, 248.)

A Minimum Wage May Be Fixed Without Violating Due Process, Provided the Wage Fixed Is Not in Fact Unreasonable or Discriminatory

It seems very difficult to understand why minimum wages may not be fixed without violating due process, if prices can be fixed without violating due process. Both interfere with liberty to contract. The legislative fixing of a minimum wage is not really different in principle from the legislative determination of hours of service which is clearly constitutional. *Miller v. Wilson*, 236 U. S. 373, 35 S. Ct. 342; *Muller v. Oregon*, 208 U. S, 412, 28 S. Ct. 324; *Bunting v. Oregon*, 243 U. S. 426, 37 S. Ct. 435.

It is the same liberty to contract that is invaded, and the same legislative policy that is involved. The aim of both types of legislation is to create an equality where none existed to prevent employers from making an unfair use of their superior bargaining power. Misuse of bargaining power leads to extortion, and surely a state should be able to legislate against extortion under its police power.

Whether there are adequate reasons for submitting certain types of contracts to the public control depends upon the economic policies of the states, and as to this the court said, in *Nebbia v. New York*, 291 U. S. 502, at page 537:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy

may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or when it is declared by the legislature, to overrule it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and a judicial determination to that effect renders a court *functus officio*. * * *"

To say that the fixing of a minimum wage by the state in any industry is *ipso facto*, arbitrary or discriminatory is to beg the question. Courts are to decide concrete cases. In this case the issue is one arising out of an implied contract. A general principle may be deduced from particular lines of decision, but the categorical assertion that any attempt to fix a minimum wage in industry, due consideration being given to the type involved, is arbitrary and discriminatory, palpably invades the power of the states. Further it is an assertion by the court of a power not found in the national constitution nor given therein by inference.

It is interesting to recall, when considering general rules to limit the police power of the state, an excerpt from Blackstone's writings, Cooley's Blackstone, 4th Ed., Book I, chapter 2, section 64, page 148:

"Sir John Fortesque, C. J., in the name of his brethren declared 'that they ought not to make answer to that question; for it hath not been argued aforetime that the justices should in any wise determine the privileges of the high court of Parliament. For it is so high and mighty in its nature that it may make law, and that which is law it may make no law, and the determination and knowledge of that privilege belongs to the Lords of Parliament and not to the justices.'

"If therefore all the privileges of Parliament were once to be set down and ascertained and no privilege

to be allowed but what was so determined, it were easy for executive power to devise some new case not within the line of privilege and under pretense thereof to harass any refractory member and violate the freedom of Parliament."

The statute provides as to any industry wherein the board finds there is need of regulation that the hours and conditions of service shall also be regulated by the welfare commission. It is submitted that it is impossible to regulate hours and working conditions without vesting in the commission some power with reference to the fixing of wages, otherwise the whole cost of any improvement in conditions or any restrictions as to hours of service might be borne by the employee.

The order in question contains regulations upon both hours and conditions, and wages. It does not appear whether or not the welfare commission based the wages on what was reasonable as between the employer and the employee, and considering the law, it must be that the reasonable rate was also sufficient for the decent maintenance of the worker. Otherwise, the commission would have had to fix a higher minimum. Whether it did or did not have to fix a minimum higher than that sufficient for decent maintenance does not appear.

THE LAWS APPLIED IN SIMILAR CASES SUSTAIN REGULATIONS OF SIMILAR IMPORT, THE CONTRACT CLAUSE FORMING THE SOLE LEGITIMATE BASIS OF APPELLANT'S ATTACK UPON THE CONSTITUTIONALITY OF THE STATUTE

In *Holden v. Hardy,* 169 U. S. 366, involving the constitutionality of an eight-hour day in underground mines in Utah, Mr. Justice Brown, in sustaining the act

challenged, applied much the same principle in dealing with the police power of the state where he said:

"It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor who apparently under the statute is the only one liable his defense is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employes whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon any equality, or where the public health demands that one party to the contract shall be protected against himself. 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected the state must suffer.' "

The broad general principles enunciated in the *Morehead v. Tipaldo* (56 Sup. Ct. 918) case are doubtless wide enough in principle to abridge the right of the state to fix minimum wages for women in any industry. (A discussion of the *Morehead v. Tipaldo* case is appended hereto as an appendix.) The state, however, has various fields in which it has the absolute right to fix wages. It is an employer itself on a vast scale. It exercises supervision over many types of public service concerns, and limits the total amount of wages that may be charged to the public without question.

Acker v. United States, Advance Opinions L. Ed., Vol. 80, Page 801.

It is necessary for the public welfare that water and light, transportation, health, and sanitary services should be continued, and if wage disputes are to be per-

mitted to interrupt the service, or to embarrass the public generally, it would hardly be open to question that the state would have power to take whatever measures are necessary to insure continuation of the services.

The same considerations apply in a large measure to hotels. The comfort and convenience of the traveling public require certain standards. Hotels are subject to inspection by public officers. The women who work for the hotels come in direct contact with the guests, and the hotels comply with many standards of sanitation and cleanliness through the maids and housekeepers in their employ.

Inns and innkeepers had been regulated by the law long before the business of insurance was considered.

The Statute of Washington Is Within the Police Power of the State When Applied to Fixing a Minimum Wage for Women Employees in a Hotel

Because the legislature determined that it was necessary for the public welfare for the wages of women and minors to be regulated in the public interest, and declared that the welfare of the state demands their protection from conditions of labor which have a pernicious effect on their health and morals, it expressly evoked its police and sovereign power to declare that inadequate wages and unsanitary conditions of labor assert such pernicious effect. (Section 1, chapter 174, Session Laws of Washington 1913.)

The supreme court of Washington, in the cause below, *Parrish v. West Coast Hotel Co.*, 185 Wash. 581 at page 593, said:

"That the powers not delegated to the United States by the constitution nor prohibited by it to the states are reserved to the states, needs no citation of sustaining authority. The police power of a state was not given to the federal government nor prohibited by the constitution to the people of the respective states, hence it is one of the reserved powers. It is true that the employer and the employee are deprived to a certain extent of their liberty to contract by the minimum wage law. However, if the deprivation is with due process, if it corrects a known and stated public evil, if it promotes the public welfare—that is, if it is a reasonable exercise of the police power—it is constitutional and it is a proper exercise of legislative power."

And again on page 596:

"We held in *Larsen v. Rice*, 100 Wash. 642, that the controversy there, which differs in no important particular from the controversy here, had an added element not found in the ordinary controversy by the individual. It was not wholly a private concern. It was affected with a public interest, the state having declared the minimum wage of a certain amount to be necessary. Therefore, the state has an interest in the way that the fixed compensation is actually paid. The statute is protective of the public as well as the wage earner.

"(2) If the state legislature and state supreme court find that the statute is of a public interest, the supreme court of the United States will accept such judgment in the absence of facts to support the contrary conclusion. Unless the supreme court of the United States can find beyond question that chapter 174, Laws of 1913, p. 602, Rem. Rev. Stat., section 7623, *et seq.*, is a plain, palpable invasion of rights secured by the fundamental law and has no real or substantial relation to the public morals or public welfare, then the law must be sustained. * * * It does not appear upon the face of the minimum wage law or from any facts of which the supreme court of the United States must take judicial notice that, in the State of Washington, evils did not exist for which our minimum wage law was an appropriate remedy. The action of the state legislature and of this court indicates that such evils do exist."

THE COURTS HAVE RECOGNIZED A WIDE LATITUDE IN THE LEGISLATURE TO DETERMINE THE NECESSITY FOR PROTECTING THE PEACE, HEALTH, SAFETY, MORALS AND GENERAL WELFARE OF THE PEOPLE

The courts have always recognized the right of the legislative branch of government to determine when the necessity for protecting the peace, health, safety, morals and the general welfare of the people exists. These are things which by duty and necessity the legislature must inquire into and determine for the purpose of making rules to serve such ends. Where there is no reasonable ground for supposing that the legislature's determination is not supported by the facts, or that its judgment is one of speculation rather than from experience, its findings are not reviewable.

Powell v. Pennsylvania, 127 U. S. 678 (Oleomargarine case);
Lawton v. Steele, 152 U. S. 133;
Holden v. Hardy, 169 U. S. 366;
Jacobson v. Massachusetts, 197 U. S. 11;
Muller v. Oregon, 208 U. S. 412;
McLean v. Arkansas, 211 U. S. 539;
Tanner v. Little, 240 U. S. 369;
Radice v. New York, 264 U. S. 292;
Block v. Hirsch, 256 U. S. 135;
O'Gorman and Young v. Hartford Fire Insurance Co., 282 U. S. 251;
Missouri Pacific R. R. Co. v. Norwood, 283 U. S. 249.

In *O'Gorman and Young v. Hartford Fire Insurance Co.*, 282 U. S. 251, a statute of New Jersey set up a standard rate of compensation for fire insurance agents by

means of a fixed commission for the services rendered by the agents. The court in declaring this statute constitutional, said:

"The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the state indicates that such evils did exist. The record is barren of any allegation of fact tending to show unreasonableness."

In *Mountain Timber Co. v. Washington*, 243 U. S. 219, this court said:

"The authority of the states to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration." (Citing the case of *Lawton v. Steele.*)

The cited case involves the destruction of fish traps by the state in protecting its fisheries.

The workman in hazardous industry in this state has no right to sue his employer for injuries suffered in the course of his employment, and he has no right to a trial by jury of such questions, "as between employee and employer, the act abolishes all right of recovery in ordinary cases, and, therefore, leaves nothing to be tried by

a jury." (243 U. S. 235.) The question of fault or negligence to defeat a claim is not open to the employer.

In *Radice v. New York*, 264 U. S. 292, at 294, this court says:

"Where the constitutional validity of a statute depends upon the assertion of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature, and if the question of what the facts establish be a fairly debatable one it is not permissible for the judge to set up his opinion in respect to it against the lawmaker."

The court there cites the case of *Stephenson v. Binford*, 287 U. S. 251, 272. That case involved a Texas statute regulating carriers and prescribing minimum rates for carriers by motor vehicle, the same to be not less than by railroads and other public service corporations.

In *Highland v. Russell Car Co.*, 279 U. S. 253, 258, it is said:

"He does not claim that the amount paid by the defendant was not compensatory or that it did not give him a reasonable profit or that the value of the coal was greater than the price fixed by the president. The sole question is whether plaintiff's constitutional rights were infringed by the enforcement of the act and orders to prevent him from selling his coal for prices in excess of the just compensation he would have been entitled to receive if it had been taken under the sovereign power of eminent domain."

The case involved the emergency regulation of industries occasioned by the World War.

The act questioned applies only to women and minors, and the order of the welfare commission applies only to the public housekeeping industry, that is, hotels. Unquestionably, there are differences between men and

women. The health and welfare of women in the performance of physical labor is held so fundamentally to affect the public welfare and to be so much an object of public interest and concern, that legislation designed for their special protection has been sustained even when like legislation for men might not be. *Muller v. Oregon*, 208 U. S. 412, sustaining the Oregon ten-hour law for women; *Riley v. Massachusetts*, 232 U. S. 671, sustaining a 54-hour week law for women; *Hawley v. Walker*, 232 U. S. 718, sustaining a nine-hour per day statute; *Bosley v. McLaughlin*, 236 U. S. 385, sustaining a statute limiting the labor of women to 48 hours per week in California; *Radice v. New York*, 264 U. S. 292, sustaining the New York night work statute for women.

With their changed economic status, it is evident that the earning capacity of women, as well as the physical circumstances surrounding their employment, reflects on the health and welfare of themselves, their families, and the community as a whole.

CONCLUSION

We ask what standing does the appellant have in this case in asserting that the statute violates the rights of contract of a woman? The woman whose right is abridged so far as contracting for wages below the minimum is not complaining, but the appellant is neither a man nor a woman. The appellant makes a general attack upon the law but it is our contention that it can only complain of the features of the act that actually affect it. The order of the welfare commission respecting the hotel industry is the only feature of the act challenged which affects the controversy.

The question presented is therefore no broader than this, can the state make a regulation that chambermaids in a hotel shall be paid at least $14.50 per week, and in case of failure to do so, may the employee have an action against the proprietor for the difference between the amount actually paid and the amount due had the minimum rate been applied? The amount in controversy is $216.19.

In *Nebbia v. New York, supra,* Justice Roberts in discussing the police power, in relation to the 14th Amendment, said:

> "It results that a regulation valid for one sort of business or in given circumstances may be invalid for another sort, or for the same business under other circumstances because the reasonableness of each regulation depends upon the relevant facts."

Keeping in mind the fact that a hotel or an inn is a business impressed with a public interest, 6 R. C. L., constitutional law, section 218, that the present controversy is a private dispute regarding the wages to be paid by a

corporation innkeeper to a domestic, that the amount in controversy is only $216.19, that no showing is made that payment at the rate prescribed by the welfare committee is unfair or unreasonable, or that it imposes any hardship on the employer, or that its business will not be profitable notwithstanding it pays the wages prescribed, and that no express contract was shown for a rate of wages different from that prescribed in the rules of the welfare commission, we submit that no sufficient, relevant facts are adduced upon which to base a general attack upon the constitutionality of chapter 174, Laws of 1913, of the State of Washington, entitled, "Minimum Wages for Women."

Therefore, the judgment of the supreme court of the State of Washington herein should be affirmed.

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APPENDIX

DISCUSSION OF THE CASE OF MOREHEAD v. TIPALDO, 56 SUP. CT. 918.

At the very outset of this case, Justice Butler, in writing the majority opinion, restricted his decision to this bare question: Is this case distinguishable from the *Adkins* case? The court states quite clearly that it was not reconsidering the question of constitutionality involved in that case. The reason for this self-imposed limitation is stated to be a general rule of court procedure that "this court confines itself to the ground upon which the writ was asked or granted." Appellants' main argument was directed to the contention that the cases were distinguishable; a review of the former case was not sought. The court, having thus limited its holding, limited it even further by deciding that it was bound by the interpretation given the statute by the New York court of appeals. (*People ex rel. Tipaldo v. Morehead*, 270 N. Y. 233, 200 N. E. 799.)

With these limitations, the Court held that the statute as interpreted violated due process and was unconstitutional. It is open to question, considering the dissenting opinion of the Chief Justice, whether or not the New York court of appeals attempted to interpret the statute or was simply comparing the New York act with that involved in the *Adkins* case, in stating that it believed them indistinguishable in principle. Of probably greater moment than the actual decision of this case is the breadth of the language used. It is here that the really fundamental differences between the majority and the minority of the court are to be found. Justice Butler propounded in one passage the following principle:

"Legislative abridgement of that freedom (in making contracts of employment) can only be justified by the existence of exceptional circumstances. Freedom of contract is the general rule, and restraint the exception."

Some of the best traditions of the supreme court have time and again recognized that freedom of contract is not unlimited, but is subject to regulation under the police powers of the state. *McLean v. State of Arkansas*, 211 U. S. 539; *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U. S. 151, 52 S. Ct. 69.

In the latter case the court said:

"The right to make contracts embraced in the concept of liberty guaranteed by the Fourteenth Amendment is not unlimited Liberty implies only freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. Hence, legislation otherwise within the scope of acknowledged state power, not unreasonably or arbitrarily exercised cannot be condemned because it curtails the power of the individual to contract."

As early as 1885, the court expressed these same sentiments in *Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357:

"But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people. * * *"

We believe further with the author of the Michigan Law Review, volume 34, page 1180, for June, 1936, that it has always been a cardinal principle of constitutional interpretation that when the constitutionality of an act depends upon the existence of a certain fact situation, the burden of proving that such facts do not exist falls upon the party alleging unconstitutionality. The presumption

of constitutionality is very strong when the legislature has found such facts to exist. Unless the act in question is unmistakably and palpably in excess of legislative power, the action of the legislature is free from objection on constitutional grounds. *Lawrence v. State Tax Commission*, 286 U. S. 276 at 283, 52 S. Ct. 556; *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U. S. 151, 52 S. Ct. 69; *McLean v. State of Arkansas*, 211 U. S. 539, 29 S. Ct. 206; *Nebbia v. New York*, 291 U. S. 502, 54 S. Ct. 505; *O'Gorman and Young v. Hartford Fire Insurance Co.*, 282 U. S. 251, 51 S. Ct. 130; *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 55 S. Ct. 187.